

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

JANAL'S ENTERTAINMENT, INC. dba Club Metro
5714 Mission Boulevard, Riverside, CA 92509,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7705

File: 47-305657 Reg: 96036209

Department's Order of Revocation

Appeals Board Hearing: February 1, 2001
Los Angeles, CA

ISSUED APRIL 30, 2001

Janal's Entertainment, Inc., doing business as Club Metro (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license for violating the terms of a prior probationary order.

Appearances on appeal include appellant Janal's Entertainment, Inc., appearing through its counsel, Mark S. Sabbah, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on April 4, 1995. Thereafter, on May 21, 1996, the Department filed an accusation against appellant for multiple acts of public drunkenness. The accusation was later resolved by appellant signing a stipulation and waiver form which conditionally revoked appellant's

¹The decision of the Department, dated October 4, 2000, is set forth in the appendix.

license, placed appellant on probation for a one year term, a 15-day suspension, and the addition of certain conditions to his license.

In June 1998, the Department filed another accusation concerning an assault on a patron by one of appellant's security personnel, with the matter subsequently becoming final. This latter matter is the "trigger" which caused the Department to vacate the 1996 stayed revocation order and revoke the license.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant did not violate the terms of the stipulation and waiver form, (2) there was no pattern shown in the triggering decision, (3) appellant did not create a law enforcement problem or disorderly house situation, and (4) the issue of reimposition of penalty for the violation of the terms of probation had been previously decided. We will review the matter as one issue, that of whether the Department was arbitrary in ordering revocation of the license.

DISCUSSION

The underlying issue is whether the Department properly or arbitrarily ordered revocation of the license.

Issue whether appellant violated the terms of the stayed revocation

The Department's May 21, 1996 accusation charged 81 acts or sub-counts, constituting a disorderly house and a law enforcement problem. Under the disorderly house count, there were 46 sub-counts of public drunkenness, from May 7, 1995² to October 23, 1996, or an average of 2 ½ incidents per month. Under the law

²The first incident of public drunkenness occurred 1½ months after issuance of the license.

enforcement problem count, there were 35 sub-counts, which included four arrests, four arrests with injuries, 12 contacts by police with reports issued, and 15 reports concerning injuries. These incidents occurred from May 7, 1996 to October 20, 1996, or an average of 2 incidents per month. The matter was resolved with appellant signing a stipulation and waiver form consenting to a sanction of revocation stayed for a probationary period of one year, a suspension of 15 days, and seven conditions to be imposed on the license. The terms of the stipulation and waiver form are specific: accept conditions to be added to the license, and, "If [appellant has] not complied with the above listed conditions on or before the expiration of the stayed period [the Department] may, without further notice, revoke the stay and enter an order revoking the license."

A decision was entered on September 25, 1997, pursuant to the terms of the stipulation and waiver form signed by appellant's representative.³ The decision essentially follows the terms of the stipulation form except that the Department added specific language which appellant did not consent to, and which essentially broadens the scope of the terms of probation:

"3. If cause for disciplinary action occurred during the stayed period, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate the stay and revoke the license. Should no cause for disciplinary action occur during the stayed period, the stay shall become permanent."⁴

³The stipulation and waiver form, and decision therefrom, are set forth in the appendix.

⁴This provision appears to be standard language used by the Department in all decisions entered pursuant to its stipulation and waiver forms. All stipulation and waiver forms, of which we are aware, including the cases cited in this order of

On June 24, 1998, the Department filed an accusation alleging a use of violence by appellant's security guard against a patron. The Department found against appellant in its decision dated February 5, 1999, to which appellant filed an appeal which appeal was resolved by the Appeals Board sustaining the Department's decision of a 25-day suspension.

The Department thereafter filed its order vacating the previously entered stayed revocation order dated September 25, 1997, based on a violation of the terms of appellant's probation due to the finalization of the February 5, 1999 matter, and imposed revocation of the license.

In those occasions where a violation has occurred subsequent to the Department's stayed revocation decision, the Department has many options to enforce conformity to law short of revocation. It may extend the terms of probation for an additional period to impress upon the licensee that revocation is a clear danger to continuation of the license; impose new terms to the existing probation, which could address circumstances found in the new violation which circumstances were not known or considered at the time of the original imposition of the probation, or both. The Department chose to revoke the license. It is not for this Board to advise the Department which option the Department should choose, but to consider the choice made in relation to the rule of abuse of discretion.

the Appeals Board, contain the language quoted. We do not know why the Department decided not to include its standard language in the stipulation and waiver form now under consideration, but it did not. We can only conclude that there was a valid reason, which apparently was to limit the exposure of appellant's license to only those conditions listed in the stipulation and waiver form, and followed by a decision filed pursuant thereto.

We note that the practice of granting or revoking probation, is a useful tool in criminal law (Penal Code §1203, et seq). While criminal law has many facets not applicable in administrative law, many of the objectives, such as the discretionary nature of allowing probation, and emphasizing conformity to law in future conduct, have parallels. It has been stated that probation is an act of clemency and may be withdrawn if the privileges are abused. (In re Bine (1957) 47 Cal.2d 814 [306 P.O.2d 445].) Also, revocation of probation is justified even though the circumstances of a new act of unlawful conduct would not justify a conviction. (People v. Calais (1974 37 Cal.App.3d 898 [112 Cal.Rptr. 685].)

We are guided by two basic principles, the first of which states that: “If the decision is without reason under the evidence, the action of the Department constitutes an abuse of discretion and may be set aside. But where the decision is subject to a choice within reason, the Department is vested with discretion of making the decision” (Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1982) 133 Cal.App.3d 814, 817 [184 Cal.Rptr. 367].) The second concept is that “Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision and the rationality of the choice.” (The Scope of Judicial Review of Decisions of California Administrative Agencies, Asimow, June 1995, Vol.42, No.5, p.1229.)

In the Appeals Board case of Attisha (1998) AB-6763, the Appeals Board reversed a decision of the Department to revoke the license on the grounds that the Department acted arbitrarily. In that case, the Department ordered the license revoked but stayed, because there were 13 instances of open containers on the premises and

drinking in restricted areas; 19 instances of narcotic violations; two public intoxication violations; one sale to an obviously intoxicated person; and one mayhem charge. In a subsequent 1994 decision, that decision being the “trigger” for the 1993 decision’s probationary terms, the Department found 25 instances of open containers and drinking on the premises; 19 arrests for possession of syringes or cocaine pipes; 9 arrests for warrants outstanding; 7 arrests for possession or under the influence of narcotics; 10 instances of loitering; one instance of vandalism; and one assault with a deadly weapon. The criticism by the Appeals Board toward the Department’s attempt to revoke the license, was direct and to the point:

“We point out that the above (the 1994 decision’s violations cited above) were not proven true (by analysis of the Appeals Board) except for one instance of drinking within the door of the premises, even though alleged and sustained by the Department’s decision – which in and of itself raises questions of arbitrariness in the dealings of the Department with this licensee. (¶) We conclude there is no proven pattern of misconduct which would call the terms of probation in the 1993 decision into play. Blindness but to the written word of probationary terms would create the very disrespect for lawful conduct that the Department has been empowered by the State Constitution and the Legislature to uphold and enforce, on a rational basis. Revocation in the present appeal would be irrational and unreasonable, and an abuse of the Department’s discretion and therefore, contrary to the public welfare or morals.”

In the case of Vargas (1998) AB-6791, the Department originally charged violations of solicitation of drinks, with appellant signing a stipulation and waiver form. A subsequent service to a person exhibiting obvious signs of intoxication was cited by the Department to vacate the stayed penalty. The Appeals Board reversed the decision of the Department on the grounds there was no pattern of similar type misconduct.

In the case of Kiti (1998) AB-6813, a stipulation and waiver form was signed concerning the sale of drug paraphernalia. On a subsequent violation of the same

offense, the Appeals Board affirmed the decision of the Department as there was a showing of a pattern of similar type misconduct.

In the case of Tony (1999) AB-7161, a suspension was stayed in a matter where service had been made to a person exhibiting obvious signs of intoxication. The Department vacated the stayed portion of the suspension. The Appeals Board in reversing the Department, stated:

“Vacation of a probation becomes arbitrary, and therefore improper, when the use thereof has minimal nexus to the original scheme of conduct. There must be some community of improper conduct connecting the original violation with the new violation.”

In the case of Portillo (2000) AB-7570, the Appeals Board affirmed the Department’s action in vacating the stayed revocation. The Board stated:

“We are firmly of the view that appellant should be held to the terms of her bargain.”

The new violation was of the same unlawful conduct for which the original matter imposed a stayed revocation.

Returning to present review, most of the 1996 case concerns multiple public intoxication violations, and police calls to the premises, the description of which the record is woefully deficient. It would appear that these police calls concerned the voluminous drunk-in-public violations.

While one could argue that the 1998 matter, concerning an assault of a customer by appellant’s security guard appears to fit into our demand for some minimal nexus to the original charge, we determine the connection is too minimal. The multiple anti-social conduct allowed by appellant in the 1996 matter, that of public intoxication, was stopped according to the record before us, by the actions of the Department in placing

appellant on probation.

Thus we must conclude that the stayed revocation did its intended work, and stopped continuance of the multiple scenes of drunkenness. In view of this record with no proven pattern of reasonably related misconduct, to revoke, now, the license, would be a thoughtless act of punishment without regard to fairness and justice.

Issue whether appellant violated the terms of the stipulation and waiver

Appellant argues that it did not violate the terms of the stipulation and waiver form. The Department apparently is basing its revocation order on the terms of the decision of September 25, 1997, which state:

“If cause for disciplinary action occurred (sic) during the stayed period, the Director of the Department of Alcoholic Beverage Control, may, in his discretion and without further hearing, vacate the stay and revoke the license”

Appellant argues that language was not in the stipulation and waiver form to which appellant consented. This then presents to the Appeals Board the need to resolve the ambiguity created by the Department where its stipulation and waiver form is precise in its terms of probation, none of which concern subsequent non-related violations as factors in violating the terms of probation.

The terms of the stipulation and waiver form are precise and circumspect: the license was revoked with execution stayed on very specific terms, which were a 15-day suspension being served; and the adding of seven conditions to its license, none of which were violated according to the record before the Appeals Board. However, the Department in restating the terms of the stipulation and waiver form in its decision, added the language stated above concerning the power to revoke the license if in addition to the precise terms of the stipulation and waiver form, further cause (some

type of similar pattern violation) occurs within the probationary period. The Department has created an ambiguity and taken an unfair advantage of appellant, and now seeks to revoke the license based on that addition by the Department.

ORDER

By September 1997, while still negotiating with the Department concerning a resolution of the 1996 case, appellant apparently came to a conclusion that a major change in its operation was necessary. The record shows that from October 1996 (the period of last violation listed in the 1996 cases' decision) to the present, incidents worth noting concerning public drunkenness, are absent, but for one incident of a security guard exercising excessive force, by knocking a patron's feet from under the patron, causing the patron to fall on his back. This incident occurred in January 1998.

It is our view that from the record, it clearly shows that due to the revocation order essentially "hanging over appellant's head," appellant "cleaned up its act" concerning the excessive police calls and drunkenness found in and around the premises. The only incident is the security guard's excessive force. We see no community of improper conduct connecting the original violation with the new violation.

Adding to this matter the fact that the reasons for the original revocation order having caused a change in the overall operation of the premises (appellant apparently having learned its lesson), and the adding of language to the decision in an attempt to broaden the terms of the stipulation and waiver form, without appellant's knowledge (this addition being the only way for the Department to sanction appellant for the excessive force charge), the Department should not be allowed to revoke the license.

The decision of the Department is reversed.⁵

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.